(10) (10) (9)

Nos. 86-495, 86-624 and 86-625

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

K MART CORPORATION,
Petitioner,
v.
CARTIER, INC., *et al.*

47TH STREET PHOTO, INC.,
Petitioner,
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE PROGRESS TRADING COMPANY, INC.

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Dated: February 20, 1987

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QUESTIONS PRESENTED

1. Should a foreign manufacturer and its wholly-owned American subsidiary be viewed collectively as one company for purposes of Section 526? If so, is it reasonable for the Customs Service to issue regulations denying that foreign controlled company the import protection otherwise available under 19 U.S.C. Section 1526 for trademarked products?

2. If the foreign manufacturer and its domestic subsidiary are not viewed collectively as one company, could Congress, in enacting Section 526, possibly have intended to repeal *pro tanto* the Sherman Act so as to allow those two companies to act together to restrict distribution and control prices for the resale in America of products which the manufacturer has sold abroad?

3. Since the administrative construction of Section 526 by the Customs Service for more than fifty years has been consistent as to companies under common control, while Congress allowed it to remain unchanged, has Congress acquiesced in and ratified that administrative construction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
1. Section 526 Does Not Benefit the Foreign-Controlled Companies Here	4
2. Savings From Parallel Imports Benefit Consumers	9
3. Congress Could Not Have Intended The Result COPIAT Seeks	13
4. Customs Has Been Consistent As To Companies Under Common Control	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

Appalachian Coals v. United States, 288 U.S. 344 (1933) 13, 14
Bulova Watch Co. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322 (E.D.N.Y. 1981) 7
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, *modified*, 383 U.S. 932 (1966) 15
Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903 (D.C. Cir. 1986) ..... *passim*
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 9
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 8, 9
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) 8
Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958) 14
United States v. Guerlain, Inc., 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958), *dismissed with prejudice*, 172 F. Supp. 107 (S.D.N.Y. 1959) 5, 19
United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 15
United States v. TOPCO Associates, Inc., 405 U.S. 596 (1972) 14
United States v. Yellow Cab Co., 332 U.S. 218 (1947) 8

Statutes and Regulations

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) 3
Section 42 of the Lanham Trade-Mark Act of 1946, 15 U.S.C. § 1124 (1982) 21
Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1982) ..... *passim*
Trade-Marks and Trade Names, 19 C.F.R. § 11.14 (1953) 19
Trade-Marks and Trade Names, 19 C.F.R. § 11.14 (1960) 19

TABLE OF AUTHORITIES—Continued

Legislative Materials Page

62 Cong. Rec. 11605 (1922) (statement of Sen. McCumber) 5
129 Cong. Rec. S15935 (daily ed. November 11, 1983) (statement of Sen. Rudman) 11, 12
H.R. 7234, 86th Cong., 1st Sess. (1959) 4, 19, 20

Other Authorities

Atwood, *The Role of the United States Bureau of Customs Import Restrictions on Trademarked Merchandise*, 59 Trade-Mark Rep. 301 (1969).... 18, 19
Bicks, *Antitrust and Trademark Protection Concepts in the Import Field*, 49 Trade-Mark Rep. 1255 (1959) 4, 13, 20
Thomas, *Seiko's Battle Against the Grey Market*, Modern Jeweler, October 1983, at 44 4
The Assault on the Right to Buy Cheap Imports, Fortune Magazine, January 7, 1985, at 89 10
Camera Prices in a Shambles, New York Times, December 11, 1982, Business Day, at 1, col. 1..... 10

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BRIEF OF AMICUS CURIAE PROGRESS TRADING COMPANY, INC.

INTEREST OF AMICUS CURIAE

By consent of the parties, Progress Trading Company, Inc. ("Progress") submits this *amicus curiae* brief in support of the United States of America and the individual Government and other Petitioners. For many years, Progress has been engaged in the business of importing into the United States for resale genuine trademarked watches which Progress buys abroad. Progress is one of many independently-owned American companies which bring highly desirable trademarked products, manufactured and sold abroad, into the United States in "parallel distribution" or the "gray market."

By competing with companies in the controlled distribution of the foreign manufacturers, Progress and the other independent importers have helped keep prices low and, in doing so, have brought on this litigation. The relationship is direct. This case exists only because of price.

The survival of such companies as Progress is at stake here. If the relief sought by Respondents and granted by the D.C. Circuit Court is allowed, Progress, as recited in an affidavit of its President, Dan Rotta, filed below in the District Court, will be forced out of business. *See* Affidavit of Dan Rotta, dated May 11, 1984, annexed as Attachment D. Also, and of the broadest implications for the general public, high fixed prices will prevail on many lines of trademarked products manufactured abroad.

SUMMARY OF ARGUMENT

1. Section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1982) (hereinafter cited as "Section 526") was not intended to benefit foreign-controlled companies, such as those which organized Coalition to Preserve the Integrity of American Trademarks ("COPIAT"). The D.C. Circuit Court recognized the key relationships here in stating: "This situation typically arises when a foreign

producer creates an American subsidiary that then registers the American trademark." *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 904 (D.C. Cir. 1986). Each such typical parent-subsidiary combination should be viewed as one company for purposes of Section 526, just as it would be so viewed under the Sherman Act, under principles set forth in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

2. Parallel distribution is in the public interest because of the savings it brings to consumers. The savings cannot be measured precisely, but they are substantial, estimated by some at 30 percent or more. The Court below recognized that its ruling may well "deprive American consumers of the benefit" of lower prices. 790 F.2d at 917.

3. If the Court should not view each of the foreign parent-domestic subsidiary combinations as "one company," then each should be viewed as subject to Section 1 of the Sherman Act. Congress never intended in Section 526 to give any special benefits to foreign companies in this area. Nor could it have intended to give a foreign company what has been called "a powerful tool for achieving monopoly conditions" for the distribution of products in this country.

The territorial allocation and price control effects sought by the Respondents are completely out of harmony with basic Sherman Act principles. If Section 526 had extended such benefits to foreign companies, it would *pro tanto* have repealed the Sherman Act. Repeals of the antitrust laws by implication are strongly disfavored.

4. In all respects material here, the Customs Service ("Customs") has been consistent in its view of the imports allowable under Section 526. The "regulations" published in 1923 and 1930 neither regulate nor interpret anything and neither prove nor disprove the consistency. But consistency has existed at least since 1936

as to both the situation where the foreign and domestic registrants of the trademark are the same company, and the situation where the foreign and domestic registrants are parent and subsidiary companies or otherwise under common control.

Any question as to the rule to apply, *i.e.*, the breadth of the exemption, has involved companies which were "related" or "affiliated" but not under common control. In 1953 Customs broadened the exemption to Section 526 by making it apply to such related or affiliated companies. In 1959 it narrowed the exemption to revert to the "subsidiary or common control" rule—a rule which it has maintained continually from 1936 to date.

The effort to secure legislation through H.R. 7234, 86th Cong., 1st Sess. (1959) failed, probably because the language of that bill was so much broader than the regulations at issue here.

ARGUMENT

1. Section 526 Does Not Benefit the Foreign-Controlled Companies Here

The essential purpose of Section 526 is to protect American owners of trademarks, not foreign owners. This section provides:

> [I]t shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States. . . .

19 U.S.C. § 1526 (1980). As Robert A. Bicks, the Assistant Attorney General for the Antitrust Division, said in 1959 in an analysis of Section 526, "[t]he alien is deliberately excluded." *See* Bicks, *Antitrust and Trademark Protection Concepts in the Import Field*, 49 Trade-

Mark Rep. 1255, 1257 (1959) The words of the statute show clearly the intent to benefit American companies, and there is not one word in the congressional debates to suggest any intention to benefit foreign—or foreign-controlled—companies. Indeed, in the Senate the question of whether a foreign company might benefit by appointing an "agent" was summarily answered by assurance to the effect that the statute would not apply. *See* 62 Cong. Rec. 11605 (1922) (statement of Sen. McCumber).

Although there was no detailed development of facts below, the case brought by COPIAT appears clearly to be one for companies which were organized by foreign manufacturers as American companies, but which are under the domination of their foreign parents. While not "agents" in the technical sense of that term, they are, in practicality, essentially that. They are under "common ownership or control" or they would not, through COPIAT, be litigating this case.

The D.C. Circuit Court recognized the common fact pattern underlying the distribution systems at issue here:

> This situation typically arises when a foreign producer creates an American subsidiary that then registers the American trademark.

790 F.2d at 904.[1]

The D.C. Circuit Court referred to COPIAT as "a trade association of United States companies that own

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[1] This typical fact situation, involving a wholly-owned American subsidiary of a foreign company, is quite different from that in the "perfume case(s)." *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958), *dismissed with prejudice*, 172 F. Supp. 107 (S.D.N.Y. 1959). Although there the district court found "a single international enterprise" in each of the three cases (155 F. Supp. at 80), two of the three were based on contracts rather than stock ownership, and in the third American Corday owned a majority, but not all of the stock of French Corday.

American trade-marks. . . ." 790 F.2d at 904. It is that, but it is much more. While COPIAT has urged below that this case concerns the statutory protection of owners of United States trademarks and has suggested, as does the word "American" in its name, that this case centers upon the protection of United States trademark owners, nowhere in the courts below did COPIAT present to the court the origin or essential nature of its core organization.

COPIAT was founded as part of an attempt by subsidiaries of foreign companies to establish a new system of price control in the United States and to eliminate what the President of Seiko Time Corporation called "deep discounts" brought about by parallel distribution. *See* Thompson, *Seiko's Battle Against the Grey Market*, Modern Jeweler, October 1983, at 44 (relevant excerpts annexed as Attachment A). In order "to combat" parallel imports, Seiko Time has, among other actions, "[f]ormed, with companies in the photographic, watch, fragrance, tire and crystal industries, COPIAT. . . ." *Id.* At the core of its formation, all of COPIAT's members, or at least those most active in organizing it, appear to have been American subsidiaries of foreign manufacturers, except for Charles of the Ritz, the parent of the French company which is the manufacturer of "Opium" perfume. As such, Charles of the Ritz has the same interests as the foreign-controlled subsidiaries in COPIAT—to control imports to the United States, thereby controlling prices. All of the original officers of COPIAT were employed by members of this core group—subsidiaries of Hasselblad, Seiko (Hattori), and Waterford Crystal, along with Charles of the Ritz. A listing of those officers appearing on COPIAT's letterhead shortly after COPIAT's formation, in a letter of July 13, 1983 which COPIAT submitted to the Treasury Department, filed in the District Court, appears as Attachment B.

Although COPIAT has persuaded many independent American companies to become members since it was organized in 1983, it has never wavered from its original purpose of seeking controlled distribution for foreign manufactured products. Instead, it has continued intensive efforts to that end in the executive, legislative and judicial branches of our government.

Despite the addition of independent American companies to its membership, it is the foreign parent-domestic subsidiary company relationships noted by the D.C. Circuit Court which are significant. 790 F.2d 904. In 1981 one of these relationships received district court attention in *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1329 (E.D.N.Y. 1981). There, the Court examined the relationship between a founding member of COPIAT, Seiko Corporation of America, and its parent, Hattori (later Hattori-Seiko). The Court found that Hattori owned all of the stock of Seiko, which in turn owned all of the stock of Seiko Time, Pulsar Time and SPD Precision, all New York corporations.

The Court further concluded that Hattori was in large part a "monocentric organization" with the center of operations "clearly in the parent's home country." 508 F. Supp. at 1338. With respect to the sales and marketing subsidiaries of Japanese manufacturers, the Court observed that they "in particular may be singularly responsive to the wishes of their parent companies." 508 F. Supp. at 1339. Finally, as to the relationship between Seiko Corporation and Hattori, the Court said it best "from a culinary point of view:"

> Hattori and its American subsidiaries do maintain some independence—about as much as the egg and vegetables in a western omelette.

508 F. Supp. at 1341.[2]

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[2] In the appendix to the Respondents' brief on certiorari, dated November 19, 1986, Respondents provide a listing of the "Members of COPIAT." That listing includes the following entry in this form: "Seiko Time Corporation/Hattori Corporation of America."

Obviously, the foreign-controlled companies which organized COPIAT are looking to this case to enable them to "maintain artificially high prices" (790 F.2d at 918) to use words the D.C. Circuit Court used which, significantly, are words so many other courts have used since 1890 in Sherman Act litigation.

We do not, however, endorse the apparent concept of the D.C. Circuit Court that the economic and trading conditions are materially different now than they were in 1922 with respect to the ability of foreign companies to maintain prices if they can have the exclusionary power of Section 526 they seek. Nothing in logic or history points to any meaningful difference in such ability of foreign companies then and now. A ruling that Congress intended to allow the exclusion of parallel goods as COPIAT seeks will have the inevitable effect of enabling foreign manufacturers, acting through their controlled subsidiaries, to engage in territorial allocation and in price-fixing in this country. Such a ruling always would have had such an effect.

We submit that it is appropriate for each of such parent-subsidiary combinations as Hattori and Seiko Time to be viewed legally under Section 526 as one company. Any questions which may once have existed under the rulings of *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) were laid to rest in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). As the Court stated:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporation consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.

467 U.S. at 771.

Everything the Court observed in *Copperweld* is logically as applicable to Section 526 as it is to Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982).

Since each of these parent-subsidiary combinations should be regarded as a single company, and since that company is essentially foreign because the parent, controlling component is foreign, the ability under Section 526 to exclude goods that company has sold abroad should not be available to it. When language of that Section speaks of "a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered . . . by a person domiciled in the United States . . . ," these are not words intended to confer any benefit to foreign companies. Everything that was said in the Congressional debates confirms that it was only the American individual or company that Congress sought to protect, and then only in a limited and special way.

2. Savings From Parallel Imports Benefit Consumers

This case centers on price, not upon some other kind of vertical restraint which might be legally permissible under the ruling of *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court in *Sylvania* was concerned with nonprice restrictions. Indeed, the Court there explicitly announced that it was not ruling upon vertical restrictions concerned with price:

> As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes, *post*, at 69-70, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in *White Motor Co.*

> *v. United States*, Mr. Justice Brennan noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 372 U.S., at 268. Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." Posner, *supra*, n. 13, at 294 (footnote omitted); see R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252 (1976); Note, 10 Colum. J. L. & Soc. Prob., *supra*, n. 13, at 498 n. 12. Furthermore, Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U.S.C. §§ 1, 45(a). No similar expression of congressional intent exists for nonprice restrictions.

433 U.S. at 51, n.18.

It is well known that parallel distribution, under attack here, brings to consumers the benefit of great savings. Almost all camera fans in this country must recognize the vast differences between what Americans now pay for cameras and what they paid before the impact of parallel imports became strong just a few years ago. On December 11, 1982, at a time when this impact had become substantial, the New York Times headlined a feature article with the words *Camera Prices in a Shambles*. *See* N.Y. Times, Dec. 11, 1982, Business Day, at 1, col. 1.

Those favoring restricted distribution and higher prices fought back. Fortune Magazine, in its January 7, 1985 issue, reviewed *The Assault on the Right to Buy Cheap Imports*, referring to actions of the opponents of gray

market sales, including by name COPIAT, in responding to price cuts. Fortune Magazine, January 7, 1985, at 89.

Each of the several public interest organizations which has taken an active interest in this matter has supported parallel importation. In letters to the Treasury Department urging retention of the present regulations, copies of which were filed in the District Court, each organization has addressed the matter of price. Consumers for World Trade, in a letter of May 19, 1983 to John M. Walker, Jr., Assistant Secretary for Enforcement and Operations of the Treasury Department, spoke of parallel importation making genuine trademarked goods available "at a significantly lower cost." Consumers Union, in a letter of June 8, 1983 to Mr. Walker, opposed any change in the regulations on the basis that it "would unduly restrict the availability of goods to American consumers and would reduce competition and increase prices in the marketplace." Public Citizen, in a letter to Mr. Walker dated July 28, 1983, also opposed an invalidation of the present regulations on the basis that "it would necessarily restrict trade and raise prices in this country." These letters are annexed collectively as Attachment C.

While the amount of price savings from parallel importation seems to vary among the many products so imported, and cannot be accurately measured, estimates made publicly seem to place savings in the vicinity of 30 percent. The President of Progress, in an affidavit dated May 11, 1984, stated, "I have been informed of estimates made by others that the price increases would probably average about 30 percent or perhaps more, and I believe such estimates are reasonable." *See* Attachment D.

On November 10, 1983, in the United States Senate, Senator Rudman stated:

> By way of background, Mr. President, this issue involves the right of a variety of small American businesses to import a wide variety of genuine trade-

> marked products such as watches and electronic goods. Because many foreign manufacturers attempt to charge artificially high prices for their products in the United States, these small businesses can purchase the genuine goods abroad and resell them here at prices lower than those charged by the foreign manufacturer's American subsidiary or controlled distributor. The benefits of this to the American consumer in the form of greater competition and lower prices are obvious. For example, when the independent distributors introduced price competition, the prices for Seiko watches, Nikon cameras, and Canon cameras all dropped by about one-third. I should stress, at this point, that we are talking about genuine goods, not counterfeit products which is an entirely separate issue.

129 Cong. Rec. S15935 (daily ed. November 11, 1983) (statement of Sen. Rudman).

The court below recognized how its ruling might enable foreign manufacturers to fix prices in the United States:

> The intervenors argue with great vigor that Section 526, as we interpret it, would deprive American consumers of the benefit of imports at prices lower than those maintained by foreign producers through exclusive distribution by their American subsidiaries. That may well be so. They further contend that other nations, particularly our trading partners and competitors, do not permit American producers to maintain prices in their countries in this fashion, and that Section 526 in today's international market constitutes a sort of economic unilateral disarmament. That may also be so. Moreover, it is certainly true that economic and trading conditions have changed a good deal since 1922, and it may now be possible for foreign producers with an exclusive distributorship in the United States to maintain artificially high prices on desirable imports in a manner quite unforeseen sixty years ago.

790 F.2d at 917-18.

3. Congress Could Not Have Intended the Result COPIAT Seeks

In enacting Section 526, could Congress have intended to empower foreign companies to control American prices as sought here? In 1959, Robert A. Bicks, the Assistant Attorney General for the Antitrust Division, said:

> A foreigner cannot take advantage of Section 526 —for the alien is deliberately excluded. Could a foreign corporation obtain the benefits of Section 526 by creating a bona fide United States corporation? If it could, both the statutory scheme and the express legislative purpose would be thwarted. For, Congress, which was concerned *only* with the protection of American owners from frauds committed by foreign enterprises, was not saying to these same foreign enterprises: "You also may get the benefits of this legislation by simply forming an American corporation. It is true that there is no question of fraud or of counterfeit marks in your case. It is true that the only result of extending this power to you is to permit you to charge the American consumer much higher prices than those found appropriate by you in other countries—in short, to be able to prevent your foreign prices from being a ceiling or check on your American prices. But we, nevertheless, give you this powerful tool for achieving monopoly conditions for the distribution of your products in this country."
>
> This was not the Congressional design.

Bicks, *Antitrust and Trademark Protection Concepts in the Import Field*, 49 Trade-Mark Rep. 1255, 1257 (1959).

The territorial allocation and price control effects which are inevitable if COPIAT succeeds in this litigation are completely out of harmony with the basic purpose and meaning of the Sherman Act as the Court has always expressed that purpose and meaning. In 1933, the Court, through Chief Justice Hughes, stated: "As a charter of freedom, the act has a generality and adapt-

ability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals v. United States*, 288 U.S. 344, 359 (1933). In 1958 the Court stated: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958).

In 1972, this Court again reminded us of the broad, fundamental nature of the Sherman Act, stating:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

United States v. TOPCO Associates, Inc., 405 U.S. 596, 610 (1972).

Since the Sherman Act became effective in 1890, the most fundamental restraints it has addressed are price-fixing and division of territories. COPIAT's position would in effect repeal *pro tanto* the Sherman Act to allow a foreign company and its subsidiary acting together ("from a culinary point of view") not only to divide world territories, but also to force American prices upward. It would thus allow the foreign companies and their subsidiaries, acting collectively, to achieve a generally higher level of prices in a segregated U.S. market than they can achieve in foreign markets.

Could Congress have intended any amendment at all to the Sherman Act? Plainly, it could not have. Although the Senate debate was miniscule, it evidenced a concern for free trade and a clear unwillingness to allow an American "agent" of a foreign company to exclude goods, as these subsidiaries of foreign companies now seek to do. Repeal by implication as to any statutory provision is

looked upon with disfavor, and a repeal *pro tanto* of the Sherman Act, "the Magna Carta of free enterprise," would be especially disfavored.

In *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963), the Court considered an argument that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, immunized those mergers which the agencies approved from challenge under the antitrust laws. This Court stated that the District Court had correctly rejected that construction of the Act, saying:

> No express immunity is conferred by the Act. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. (citations omitted)

374 U.S. at 350. The Court also stated:

> It is settled law that "[i]mmunity from the antitrust laws is not lightly implied." People of State of California v. Federal Power Comm'n, 369 U.S. 482, 485, 82 S.Ct. 901, 903-904, 8 L.Ed.2d 54. Cf. United States v. Borden Co., 308 U.S. 188, 198-199, 60 S.Ct. 182, 188-189, 84 L.Ed. 181; United States v. Southern Pac. Co., 259 U.S. 214, 239-240, 42 S.Ct. 496, 501-502, 66 L.Ed. 907. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry. . . .

Id. at 348.

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), the Court considered an argument for an implied repeal of the relevant provisions of the Sherman and Clayton Acts by provisions of the Shipping Act

of 1916. The Shipping Act contains an explicit provision exempting rate-making agreements which have been approved by the Maritime Commission, and the respondents urged that the structure of the Act and its legislative history demonstrated a purpose to free the shipping industry from the antitrust laws.

In rejecting this argument, the Court stated:

> We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities. We recently said: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agriculture Acts. (citations omitted)

383 U.S. at 217.

Under these principles, any combinations among the entities comprising COPIAT, designed to allocate territories and to raise prices, are clearly forbidden by the Sherman Act. The purpose and effect of such combinations must be viewed as illegal, not only as to the members of COPIAT in the aggregate, but also as to individual foreign manufacturers and their individual wholly-owned American subsidiaries.

4. Customs Has Been Consistent As To Companies Under Common Control

The Court below was persuaded that there was a lack of a consistent approach by Customs since the enactment of Section 526. After referring to Customs' "first set of regulations in 1923" and "second set of regulations, promulgated after the 1930 reenactment of Section 526 . . .," the language of the statute, its legislative history and purpose "and the contemporary construction placed upon it" by the "regulations" of 1923 and 1930, the Court concluded that Section 526 cannot be limited in the way which the Customs Service has attempted. 790 F.2d at 913-15. The Court stated that:

> From this review we find that the Customs Service's interpretation of Section 526 does not display the necessary "thoroughness, validity, and consistency" to merit judicial acceptance.

Id. at 916. The Court stated further: "Nor has the Customs Service's interpretation since . . . [the adoption of that interpretation] . . . been supported by anything more than poorly articulated and vacillating reasoning." *Id.*

The fact is that in 1923 and 1930, when Customs issued its "contemporary regulations," they did not bring any interpretation or guidance and did not regulate at all. They merely summarized the statutory language, as the Government Petitioners pointed out in their brief in the D.C. Circuit Court. Appellees' Brief at 3, *Coalition To Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903 (D.C. Cir. 1986). As the D.C. Circuit Court recognized, these first "regulations" do not support the position of the Petitioners. But neither do they support the position of the Respondents, because they are meaningless as an interpretative tool.

However, there has been consistency by Customs; it started more than a half century ago, and is demonstrable from 1936 to date. Antitrust considerations must have been in the minds of Customs officials from at least 1936 because they always held that if both the domestic and foreign branches of a multi-national corporation were a "single company," Section 526 would not bar entry.

Significantly, from the early days, they were also consistent in applying the same rules to wholly-owned subsidiaries and companies under common control, thus effectively treating them as falling within the single company doctrine.

The confusion that is claimed to exist in the Customs' interpretations stems from the treatment of "related companies" or "affiliated companies." The question of how companies that are related or affiliated but not under common control should be dealt with by Customs has indeed been answered by different people in different ways, perhaps because those words have on occasion been used to refer to subsidiaries and companies under common control and at other times used to refer to companies which are related to a lesser degree in that common control is lacking. It is the treatment of this latter group of companies which has varied.

The most cited historical review of Section 526, Atwood, *The Role of the United States Bureau of Customs Import Restrictions on Trademarked Merchandise*, 59 Trade-Mark Rep. 301 (1969),[3] acknowledges that the Government's practice, or policy, "has not remained constant." But the lack of consistency applies only to the

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[3] Cited, not only by the Petitioners, but by the Circuit Court (790 F.2d at 915) and by the Respondents in their Brief in the D.C. Circuit Court. Appellants' Brief at 28, *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903 (D.C. Cir. 1986).

treatment of "related companies" which are *not* under common control. As that historical review correctly states, after discussing the "perfume" cases of the late 1950's and the dismissal of the suit in the Supreme Court:

> This strange turn of judicial events left the Bureau of Customs in an awkward position. Actually, *it had always denied complete exclusionary protection to an American trademark registrant when it knew the importer to be a subsidiary or parent of the foreign user of the trademark.* Prior to 1953, however, the Customs Regulations were not set up to specifically elicit this kind of information. To a degree, then, the position of Customs did agree with Justice, but it had not been developed to deprive any American registrant from full protection merely because there was *some* affiliation between the American firm and a foreign firm.

Id. at 307 (emphasis added). The comment that the position of Customs did to a degree agree with that of Justice referred to the view of Justice that the use of Section 526 affiliated firms was, as Mr. Atwood put it, "a form of monopolization condemned by Section 2" of the Sherman Act. *Id.* at 306.

The confusion caused by the problem of how to treat affiliated or related companies has been particularly notable on three occasions: (1) in 1953 when Customs adopted a policy of treating related companies *not* under common control as equivalent to subsidiaries and to those other companies which *were* under common control, Trade-Marks and Trade Names, 19 C.F.R. § 11.14 (1953), *see* 790 F.2d at 915; (2) in 1959 when Customs revoked that policy without adequately explaining its reasons for doing so, *see* Trade-Marks and Trade Names 19 C.F.R. § 11.14 (1960); *cf.* 790 F.2d at 915; and (3) again in 1959 when Congressman Celler, the Chairman of the House Antitrust and Monopoly Subcommittee, sponsored H.R. 7234, 86th Cong., 1st Sess. (1959), seeking to

bring about the enacting of the legislation which the Justice Department had said it favored when it withdrew the "perfume litigation."

Apparently, the Celler bill failed because of overreaching by the drafters of its language. Congressman Celler, famous for his leadership in advocating strong antitrust enforcement, in that bill, which was supported by all interested Departments—Justice, Treasury, State and Commerce—sponsored legislation which would have revised Section 42 and, as the D.C. Circuit Court noted, "would have repealed Section 526 altogether." 790 F.2d at 915. Other provisions would have excluded from protection not only subsidiaries and other companies under common control, but also agents and distributors and those who were "affiliated," including in that word any arrangement whereby the registrant had a continuing contractual relationship with the foreign manufacturer with regard to that mark. *See* Bicks, *Antitrust and Trademark Protection Concepts in the Import Field*, 49 Trade-Mark Rep. 1255, 1260 (1959). The bill did not pass. No wonder.

CONCLUSION

The D.C. Circuit Court's decision does not take proper account of the purposes for which Section 526 was enacted; it accords improper weight to unimportant aspects of the history of that legislation and of its treatment by the Customs Service; and it takes no account of the consistent treatment by Customs of international enterprises which are in effect "one company," controlled from abroad. In doing so, it produces a result which is not only contrary to the interest of consumers, but also contrary to the views expressed in the relevant congressional debates and contrary to basic principles embodied in our antitrust laws.

The decision of the D.C. Circuit should be reversed in all respects, except as to jurisdiction, and the case re-

manded with directions to enter a final judgment in favor of the Petitioners and against the Respondents with respect both to 19 U.S.C. § 1526 and 15 U.S.C. § 1124.

Respectfully submitted,

WILLIAM F. SONDERICKER
ROBERT L. HOEGLE
FRANK W. GAINES, JR.*
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
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Washington, D.C. 20006
(202) 659-4871
Attorneys for Amicus Curiae
Progress Trading Company, Inc.

* Counsel of Record

Dated: February 20, 1987

ATTACHMENTS

ATTACHMENT A

Excerpts from Interview of Robert Pliskin
President of Seiko Time Corporation
Published in *Modern Jeweler* Magazine of October 1983.

"SEIKO'S BATTLE AGAINST THE GREY MARKET"
by Joe Thompson/MJ Editor

"*Seiko is appealing to jewelers to help it stop an industry* threat. For Robert Pliskin, it is an awful irony.

For the past five years, since he took over as president of Seiko Time Corp., the American jeweler's best selling watch has been Seiko.

And yet, over the same span, the most annoying watch to American jewelers has been Seiko too.

The reason: the notorious grey market, the vast perfectly legal loophole in the free market system which allows companies to buy Seiko watches abroad, import them into the United States and sell them at discounted prices.

The result: for every three Seiko watches sold in the U.S. today by Seiko Time, a fourth is sold by a grey market importer, according to best industry estimates. That amounts to about $80 to $100 million that is siphoned from jewelry and department store sales each year.

• • • •

The details of Seiko's grey market battle came from Seiko President Pliskin in an exclusive *Modern Jeweler* interview in his Fifth Ave., New York City office in early August. Elements of Sieko's campaign have been made public before. There was the 'authorized Seiko dealer' program launched in 1980 and the firm's success-

ful legal action last year against Alexander's, a New York City area department store chain.

• • • •

Until now, though, Seiko has held its peace about other actions it has taken to combat what it considers illegitimate traffic in its goods. Those actions include:

• Long legal and lobbying efforts to win exclusive control of its trademark under U.S. law. Seiko Time has enlisted the aid of three major law firms in New York and Washington, D.C. which specialize in trademark law. The cost to the company has been 'hundreds of thousands of dollars in legal fees,' says Pliskin. Currently Seiko Time is unable to gain legal protection for its trademark because it is a subsidiary of a foreign company, Hattori Seiko Co. Ltd. of Japan.

• The closing of Seiko Time accounts who also deal with grey market importers. In the past two years, Seiko Time has dropped six such accounts, costing the company a hefty loss of $6 million annually, according to Pliskin. (The Seiko president revealed the names of the firms to MJ on the grounds that they not be published.) Says Pliskin, 'We don't sell to people who buy from grey marketers.'

• *Formed, with companies in the photographic, watch, fragrance, tire and crystal industries, COPIAT, Coalition to Preserve the Integrity of American Trademarks.* (emphasis supplied)

• • • •

COPIAT's position is that grey marketers are, in effect, free loaders. They make no investment of their own in a product but take advantage of the good name, good marketing, and goodwill built up over the years by trademark owners. 'They are parasites,' says Pliskin, 'who contribute nothing to a trademark, who disrupt the marketplace, who use and abuse trademarks until eventually

they are killed and then they move on to something else.'

* * * *

They damage Seiko Time in many ways, Pliskin points out. They take away business from the firm. They create dissatisfaction among its jeweler customers when Seiko goods turn up in discount outlets. They damage the image of the Seiko brand by placing the product in inappropriate retail outlets at deceptively low prices.

* * * * *

. . . They also sour the jeweler's relationship with some customers who complain when they discover cheap Seikos selling in cheap outlets.

* * * *

Finally, the consumer often is attracted to grey market Seikos because of a low retail price."

ATTACHMENT B

(Excerpts from COPIAT letterhead with names of officers)

COPIAT Coalition to Preserve the Integrity
of American Trademarks
1201 Pennsylvania Avenue, N.W.
P.O. Box 761, Washington, D.C. 20044

Robert H. Miller
President
Charles of the Ritz Group Ltd

John Wagner
Executive Vice President
Victor Hasselblad Inc.

Ronald J. Thomas
Vice President & Secretary
Seiko Corporation of America

Walter J. George
Vice President & Treasurer
Waterford Crystal Inc.

David S. Mosteller
Executive Director
Charles of the Ritz Group Ltd

Scott D. Gilbert
General Counsel
Covington & Burling

ATTACHMENT C

CONSUMER'S
UNION
Publisher of Consumer Reports

June 8, 1983

John M. Walker, Jr.
Assistant Secretary for
Enforcement and Operations
Room 4308
Department of the Treasury
15th Street and Pennsylvania Ave., N.W.
Washington, D.C. 20220

Dear Mr. Walker:

It is our understanding that you are currently considering to propose an amendment to Customs regulations that would limit the competitive importation of goods bearing registered trademarks for which there exists an exclusive U.S. distributorship.

Consumers Union believes that this proposal, were it to be effected, would unduly restrict the availability of goods to American consumers and would reduce competition and increase prices in the marketplace.

We support exclusion of goods that are not genuine articles entitled to bear a trademark. However, we do not see any legal or economic justification for exclusion of genuine articles. It should not be the role of Customs to enforce private exclusive dealership agreements. Indeed, we believe that many of these agreements are or should be unlawful under U.S. antitrust laws.

I hope that after deliberation you will determine not to issue the draft proposed regulation.

Sincerly,

/s/ Mark Silbergeld
MARK SILBERGELD
Director, Washington Office

MS/rmj

PUBLIC CITIZEN

Congress Watch • Critical Mass Energy Project •
Health Research Group • Litigation Group •
Tax Reform Group

July 28, 1983

Mr. John M. Walker, Jr.
Assistant Secretary for Enforcement
and Operations
Department of the Treasury
Room 4308
15th Street & Pennsylvania N.W.
Washington, D.C. 20220

Dear Mr. Walker:

The Customs Service has proposed to amend 19 C.F.R. § 133.21 in a way which would limit the competitive importation of trademarked goods. The amendment would allow foreign manufacturers, acting through American subsidiaries, to bar imports into the United States of their products which the manufacturers have sold abroad.

As you know, many trademarked foreign products are now available to the American public at discount prices. This discount market is supplied in significant part with imported goods by small companies which buy those goods at various overseas locations where prices are lower than they are in the United States.

Since the proposed amendment would allow the foreign manufacturers, acting through American subsidiaries, to cut off the supplies of the discount market, it would necessarily restrict trade and raise prices in this country.

Congress Watch urges you to reject the proposed amendment. As you know, the present regulation has been in effect since 1972 and is a codification of practices of the Customs Service going back decades. Through

these years, small businesses and the public have had the benefits of competitive imports. Those benefits should not be taken away.

Sincerely,

/s/ Jay Angoff
JAY ANGOFF
Staff Attorney

CONSUMERS (CWT) FOR WORLD TRADE

1346 Connecticut Avenue NW
Washington, D.C. 20036 (202) 785-4835

[Received May 20, 1983]

May 19, 1983

John M. Walker, Jr.
Assistant Secretary for Enforcement
and Operations
Room 4308
Department of the Treasury
15th Street and Pennsylvania Ave., NW
Washington, DC 20220

Dear Mr. Walker:

I am writing to express Consumers for World Trade's (CWT) concern about the proposed change in Customs regulations which deal with the importation of trademarked merchandise. This change would prohibit the parallel importation of any product purchased abroad bearing a registered trademark for which there exists an authorized distributorship in the United States, regardless of whether this distributorship was under foreign or domestic ownership or control.

CWT is a national, non-profit organization established in 1978 which, through education and legislative action respectively, keeps American consumers informed of their stake in international trade policy and speaks out for the interests of consumers when trade policy is being formulated. We believe that this regulatory change by the Customs Office, would have a severe impact on American consumers for the following reasons.:

—It would, as does a regular import quota, limit the availability in the American marketplace of certain trademarked products.

—As a quota, by protecting the distributor from competition, it would artificially increase the price of his product.

—In addition, since the parallel importation of goods with a genuine trademark results in these goods being available to the consumer at a significantly lower cost than those sold through a distributorship, consumers will be deprived of the opportunity to purchase the product of their need or want at an affordable price. This often results in the low and fixed income consumer being affected the most.

American consumers, knowing the advantages or disadvantages accompanying their choice, should have the right to select either the more expensive or the cheaper product bearing the same trademark. CWT, therefore, urges you not to approve the proposed revision to Customs regulations.

Sincerely,

/s/ Doreen L. Brown
DOREEN L. BROWN
President

DLB:k

cc: David Q. Bates
R. Richard Newcomb

ATTACHMENT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0390

COALITION TO PRESERVE THE INTEGRITY
OF AMERICAN TRADEMARKS,
CARTIER, INCORPORATED, and
CHARLES OF THE RITZ GROUP LTD.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
DONALD T. REGAN, and
WILLIAM VON RAAB,
Defendants.

AFFIDAVIT

City of New York)
) ss.
State of New York)

DAN ROTTA, first being duly sworn, says:

1. I am President of Progress Trading Company, Inc. ("Progress"), which seeks leave to file a brief in this action as *amicus curaie*. The statements herein are made upon personal knowledge except for Paragraph 7 and the indicated part of Paragraph 6, which are upon information and belief.

2. Progress is an independently-owned domestic company engaged in the business of importing genuine trademarked goods, specifically watches, into the United States

for resale. Progress is unaffiliated with any foreign company or manufacturer whose goods Progress imports.

3. The watches imported by Progress are of identical quality to watches imported from the same manufacturer by Plaintiffs and others. The markings which Progress applies to such watches do not damage the watches nor in any way impair their operation or quality.

4. Progress gives its own warranty for the watches it imports and maintains its own warranty repair facilities staffed by Progress employees and well stocked with an inventory of repair parts. Because of the location and staffing of Progress' warranty repair facility, the warranty service of Progress is provided more promptly than the service offered by subsidiaries of the foreign manufacturers.

5. For over a year, Progress has opposed the efforts of Plaintiffs and others to induce the United States Customs Service to rescind its regulations and thereby prevent the importation into the United States of genuine trademarked goods of foreign manufacture except by their so-called "authorized" subsidiary, parent or affiliated companies in the United States.

6. If the regulations were to be changed as sought by Plaintiffs in this case, it would have a critical impact on the business of Progress. Such change would also have a critical impact on other independent American importers in that scores, if not hundreds, of independently-owned small businesses engaged in importing genuine trademarked goods from abroad for resale in the United States would at a minimum be seriously injured, and I believe all, or almost all, of them would be forced out of business.

7. As a result of the competition from independent American importers such as Progress, American consumers are paying lower prices for foreign-manufactured

watches. If the Customs rules were rescinded as sought by Plaintiffs, such competition would be eliminated and prices of foreign-manufactured watches and other foreign-manufactured trademarked goods would increase substantially. I have been informed of estimates made by others that the price increases would probably average about 30 percent or perhaps more, and I believe such estimates are reasonable.

/s/ Dan Rotta
DAN ROTTA

Subscribed and sworn to before me this 11th day of May, 1984.

/s/ Ivy A. Schneiderman
IVY A. SCHNEIDERMAN
Notary Public

My commissions expires March 30, 1985.